In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 63

ANDREW J. AUGUSTINE AND SALVATORE J. AUGUSTINE, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinions of the Court of Appeals (R. 101-102, 103-104) are reported at 188 F. 2d 359.

JURISDICTION

The judgments of the Court of Appeals were entered on March 30, 1951. (R. 102, 104.) Petitions for rehearing were denied on April 20, 1951. (R. 122.) The petition for a writ of certiorari

was filed on May 18, 1951. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

As to both petitioners:

1. Whether an indictment alleging that the petitioners wilfully attempted to evade and defeat taxes of a corporation owned by them by filing and causing to be filed false and fraudulent tax returns sufficiently charges an offense under Section 145 (b) of the Internal Revenue Code.

As to petitioner Salvatore J. Augustine:

2. Whether the evidence was sufficient to sustain the conviction.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

(a) [As amended by Sec. 5(c), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126] *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who wilfully

fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

Petitioners were indicted on August 29, 1949, in the Eastern District of Pennsylvania on charges that they wilfully and knowingly attempted to defeat and evade a large part of the taxes due

and owing by the Augustine Construction Company, a corporation, for the calendar year 1943 by filing and causing to be filed false and fraudulent tax returns wherein they alleged that the net income of the corporation was $22,265.45 and that the tax due thereon was $14,543.42, whereas the net income of the corporation was $122,265.45 upon which the tax due was $61,928.23. (R. 4a-5a.)

Andrew A. Augustine and Salvatore J. Augustine were president and secretary-treasurer, respectively, of the Augustine Construction Company, and, with the exception of a one-third qualifying share owned by another, each owned one-half of the corporation's stock. (R. 29.) Evidence was produced that the Augustine Construction Company was a subcontractor for the Corbetta Construction Company at the plant of the Bethlehem Steel Company at Bethlehem, Pennsylvania (R. 26), and that in November and December, 1943, Corbetta Construction Company paid to Augustine Construction Company two checks for $60,000 and $40,000, respectively (R. 26-27, 91, Govt. Ex. 4, 5), representing payments of retained percentages on the subcontract performed by Augustine Construction Company (R. 26-27). The checks were both endorsed "Augustine Construction Company" and "Andrew Augustine" (R. 27), with the additional endorsement "Credit to account of Andrew Augustine" on the $60,000 check (R. 28, 93, Govt. Ex. 4). The checks were not deposited in the bank account of the Augustine Construction Company (R. 28,

30-31, 36, 53, 57) and were not entered on the books of the Augustine Construction Company (R. 26, 29, 40, 53, 96). Instead, they were deposited in a personal account of Andrew Augustine in another bank. (R. 27-30, 41, 43, 45-48, 52-53, 93-94.) The balance in this account immediately preceding the deposits was $552.54. (R. 41.)

Andrew Augustine did not retain the canceled checks of this personal account. (R. 31.) Recordak records of the bank showed that two checks for $10,000 each were drawn by Andrew Augustine on the personal account in December, 1943, to the order of the Augustine Construction Company. (R. 33, 35-36, 39.) These checks were entered in the cash receipt book of the corporation as "loan, Andrew Augustine" and "A. Augustine, Loan $10,000" and deposited in the corporate bank account. (R. 33, 36, 39.) There was also a check for $17,707.98 drawn by Andrew Augustine to the Fidelity Mutual Life Insurance. (R. 34, Pet. Ex. 3.)

One check for $10,000 payable to S. J. Augustine was drawn on January 14, 1944, and endorsed "S. J. Augustine" and "Andrew Augustine" and cashed. (R. 34-35, 36, 41-45.) Another check for $10,000 was drawn to the order of Salvatore Augustine on January 4, 1944, and similarly endorsed and cashed. (R. 35, 37, 39-45.) Two other checks, each for $10,000, and one for $2,195 were paid to Salvatore and deposited in his personal bank account. (R. 35, 38, 49, 56-57.)

Both Andrew Augustine and Salvatore Augustine gave instructions to the bookkeeper of the Augustine Construction Company. (R. 51.) Andrew was mostly out in the field, in Bethlehem. Salvatore was mostly in Philadelphia, and was the only one of the firm who was in the office most of the time. (R. 52.) Salvatore spent some time of each day in the office. (R. 52.) Neither petitioner testified. (R. 7a.)

The income and excess profits tax returns of the Augustine Construction Company (Govt. Ex. 1, 2) were signed by the petitioners as corporate officers (R. 57, 87-88, 97). The returns were prepared from the figures reflected in the books of the company (R. 86, 88-89), and they did not include the $100,000 received from Corbetta Construction Company (R. 58-59), resulting in a tax deficiency of $47,384.81 (R. 59).

The trial judge instructed the jury, in part, as follows (R. 8a, 10a-11a):

> You must acquit the defendants if you find as a fact they did not have any criminal intent or intent to violate the law. There must be a finding of criminal intent beyond a reasonable doubt upon the part of any defendant whom you find guilty.
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> * * * * *
>
> Now, of course, it is possible if you believe all the other evidence that Salvador J. Augustine did not know the source of the income of these $10,000 checks. You also have evi-

dence that Salvador J. Augustine was in the office from time to time, and that Andrew A. Augustine was out in the field. There is also evidence that they were the sole stockholders of the corporation, except parts of a share to qualify a stockholder which was issued to someone else.

Did Salvador J. Augustine from his half ownership of the business and from his office as secretary-treasurer of the corporation and from his supervisory capacity in the office, did he know when he signed the tax return that there was deleted therefrom the sum of $100,000 as income rightly belonging to the Augustine Construction Company? If you find from the evidence and believe beyond a reasonable doubt that he knew that that was a false return, then you should find him guilty. If you find from the evidence that the construction company was not entitled to this $100,000 or that they did not receive it, or that when he signed the return he did not know that it was incorrect, or, if you believe that the return was correct, then you should find Salvador J. Augustine not guilty.

A verdict of guilty was returned as to both petitioners (R. 2a), and Andrew was sentenced to $2,000 fine and four months' imprisonment. Salvatore was sentenced to $1,000 fine and two months' imprisonment. (R. 3a.) Upon appeal to the Court of Appeals for the Third Circuit, the judgment in each case was affirmed (R. 101-104), and petitions for rehearing filed on behalf of each petitioner (R. 105-121) were denied (R. 122).

ARGUMENT

1. Petitioners claim that the filing of false and fraudulent tax returns does not constitute such affirmative conduct, within the meaning of *Spies* v. *United States,* 317 U. S. 492, as to warrant prosecution under Section 145(b) of the Internal Revenue Code, *supra,* for wilfully attempted evasion. They contend that at most the indictment charged a misdemeanor under Section 145(a) of the Internal Revenue Code, *supra,* and that the court should therefore have instructed the jury (Pet. 5):

> Mere failure to return income and pay the tax on it, assuming that the taxpayer knew it was due, does not constitute the offense of wilfully attempting to defraud and evade the income tax.

This precise contention was raised and rejected in *Cave* v. *United States,* 159 F. 2d 464 (C.A. 8th), certiorari denied, 331 U. S. 847, rehearing denied, 332 U. S. 786. See also *Myres* v. *United States,* 174 F. 2d 329 (C.A. 8th); *United States* v. *Croessant,* 178 F. 2d 96 (C.A. 3d), certiorari denied, 339 U. S. 927; *United States* v. *Pannell,* 178 F. 2d 98 (C.A. 3d); *Barrow* v. *United States,* 171 F. 2d 286 (C.A. 5th); *Gaunt* v. *United States,* 184 F. 2d 284 (C.A. 1st), certiorari denied, 340 U. S. 917. Cf. *Taylor* v. *United States,* 177 F. 2d 194 (C.A. 4th); *Rick* v. *United States,* 161 F. 2d 897 (C.A. D. C.).

Section 145(b) provides, *inter alia,* that "any person who willfully attempts *in any manner* to evade or defeat any tax * * * shall * * * be guilty of a felony * * *." [Italics supplied.] This broad language plainly indicates a Congressional intention to cover all possible means of attempted evasion (*United States* v. *Miro,* 60 F. 2d 58 (C.A. 2d)), including the filing of a false return. Cf. *United States* v. *Johnson,* 319 U. S. 503, rehearing denied, 320 U. S. 808; *Johnson* v. *United States,* 318 U. S. 189, rehearing denied, 318 U. S. 801; *United States* v. *Ragen,* 314 U. S. 513, rehearing denied, 315 U. S. 826; *United States* v. *Troy,* 293 U. S. 58.

The decision below is not in conflict with *Jones* v. *United States,* 164 F. 2d 398 (C.A. 5th). Any question in this regard has been completely eliminated in favor of the Government's position here by the Fifth Circuit's later decision in *Barrow* v. *United States,* 171 F. 2d 286.

2. The evidence was ample to sustain the conviction as to petitioner Salvatore J. Augustine. The Government proved that he was an officer and half owner of the corporation; that he gave instructions to the bookkeeper; that he spent some time in the office each day; that he personally received a minimum of $42,195 of the $100,000 paid to the corporation; that part of this money was deposited in his personal bank account; and that some of the checks transferring the money

from Andrew's account to Salvatore bore his endorsement. It is not disputed that the petitioner signed the corporation income and excess profits tax returns knowing that they did not include the $100,000 sum. Contrary to petitioners' contention, the trial court did not permit Salvatore Augustine's guilt to rest solely on mere knowledge of the falsity of the returns in question but was careful to require acquittal if the jury found that he "did not have any criminal intent or intent to violate the law." (R. 8a.) The element of intent did not require direct proof, and, as the Court of Appeals noted, the jury clearly was entitled to find from all of the evidence in the case that the petitioner had committed a violation within the purview of the statute.

CONCLUSION

The decisions of the court below are plainly correct and present no conflicts. The petition for writ of certiorari should be denied as to each petitioner.

Respectfully submitted,

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